



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBAS

CIVIL CASE NO. 86 OF 2012

ROY MCKENZIE PLAINTIFF

AND

CARTRACK KENYA LIMITED 1ST DEFENDANT

911 SECURITY LIMITED

(T/A CARTRACK GROUP) 2ND DEFENDANT

RULING

1. The Plaintiff obtained judgment for injuries suffered while he travelled as a passenger of the Defendants motor vehicle. The decretal sum is over Kshs. 5 million.
2. There is pending before Court a Notice of Motion dated 4th April 2014 for an order to set aside that judgment.
3. The Court by this Ruling is considering the Defendant's Notice of Motion dated 7th April 2014 (**the application**). That application seeks the order for release of Defendant's attached goods, and for the order that the auctioneer do tax its bill.
4. Although the parties engaged themselves in submissions on whether the warrants of attachment were valid when the attachment took place this matter will however be determined by the Court's consideration of the affidavit in support of the application.
5. The affidavit in support of the application was sworn by Samson Wambugu Ndegwa, the learned Counsel for the Defendant. There were three submissions made in respect to that affidavit.
6. The Plaintiff submitted that the deponent of the affidavit, Mr. Ndegwa, had failed to state therein that he was authorized by the Defendant to swear the affidavit. Plaintiff did not cite any legal provision requiring an affidavit be sworn on authority of the party in the case.
7. Mr. Ndegwa in response to that submission drew the Court's attention to paragraph one of his affidavit where he stated-

“That I am an Advocate of the High Court of Kenya and I have the conduct of this suit on behalf of the Applicant, thus to swear (sic) this affidavit.”

8. Plaintiff further submitted that the affidavit of Mr. Ndegwa offended Order 19 Rule 3(1) of the Civil Procedure Rules. That Rule provides-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the source, and grounds thereof.”

9. In response to that submission defence stated that Mr. Ndegwa raised pure points of law and did not therefore offend that Rule.

10. The final attack of Mr. Ndegwa’s affidavit by the Plaintiff was to the effect that it did not comply with Section 5 of Oaths and Statutory Declarations Act Cap 15. That Section provides as follows-

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat.”

11. Mr. Ndegwa’s affidavit at the jurat is shown as having been sworn in

Nairobi but the Commissioner of Oaths stamp shows his address to be in Mombasa. Plaintiff argued that it was either that the affidavit was sworn in Mombasa or was signed in Nairobi but rubber stamped in Mombasa by the Commissioner of Oaths. In either case Plaintiff submitted that the affidavit contravened Section 5.

12. Mr. Ndegwa’s initial response to that submission was-

“I say the fact it was rubber stamped elsewhere does not substract the substance of the evidence.”

Later on Mr. Ndegwa stated-

“I prepared the application in Nairobi but came with it to Mombasa.”

13. The Plaintiff submission that Mr. Ndegwa did not state he had authority to swear the affidavit is rejected. Mr. Ndegwa stated that he is the Counsel who has the conduct of this suit on behalf of the Defendant. It is further rejected because Order 19 of the Civil Procedure Rules does not require such authority be stated. It is clear that Order 19 envisages affidavit may be sworn in action by persons who are not parties in such an action.

14. The Plaintiff was correct in submitting that Mr. Ndegwa’s affidavit failed to disclose the source of his information in his affidavit. The source of the information in the following paragraphs needed to be disclosed-

**“5. THAT on 4/4/2014, the auctioneers herein purported
to attach the client’s goods and ferried them away and
our efforts to get notification of sale were unsuccessful.**

**7. THAT upon being questioned they indicated that a
proclamation does not expire whereas a proclamation**

is based on a warrant.”

Mr. Ndegwa ought to state the source of the information that attachment took place at the Defendants premises. The Plaintiff’s objection based on Order 19 Rule 3(1) is therefore upheld in respect of paragraphs 5 and 7 of Mr. Ndegwa’s affidavit.

15. But I find that it is the objection raised in respect of Section 5 of Cap 15 that deals a fatal blow to Mr. Ndegwa’s affidavit. The effects of that blow is not reduced by Mr. Ndegwa’s inconsistent submissions above. At first he down played the effects of an Oath taken before a Commissioner of Oaths by referring to it as a rubber stamp, then later stated that the application was prepared in Nairobi but brought to Mombasa. It is not clear what he wanted the Court to understand from that submission but it is important to restate the importance of the Oath taken when executing the affidavit. On this I will refer to the definition of an Oath as defined in the Blacks Law Dictionary as follows-

“Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.”

Considering the above I make a finding that the affidavit of Mr. Ndegwa dated 7th April 2014 was not sworn. In this regard I refer to the holding in the case C.M.C. MOTORS GROUP LTD –Vs- BENERIA ARAP KORIR T/A MARBEN SCHOOL & ANOTHER [2013]eKLR-

“Bearing that definition the question that needs to be answered is whether Wando took an oath before a Commissioner of Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner of Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.”

16. The fate of the affidavit in the above case is the same that will befall Mr. Ndegwa’s affidavit. It is clear that the affidavit though executed in Nairobi was rubber stamped in Mombasa. It was not sworn as required by Section 5 of Cap 15. It is for that reason that it is hereby struck out. Having been struck out the Notice of Motion dated 7th April 2014 not having any evidence to support it is also hereby struck out.

17. In the end the Notice of Motion dated 7th April 2014 and the affidavit in its support signed by Samson Wambugu Ndegwa on 7th April 2014 are hereby struck out with costs to the Plaintiff.

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE